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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL HERRERA SAAVEDRA, Defendant and Appellant.	D056645 (Super. Ct. No. INF057063)

APPEAL from a judgment of the Superior Court of Riverside County, Richard A. Erwood, Judge. Affirmed.

A jury convicted Miguel Herrera Saavedra of six counts of committing a lewd act on a child under 14 years of age (Pen. Code, § 288, subd. (a)),[1] four counts of committing a lewd act on a child under 14 years of age by force or duress (§ 288, subd. (b)(1)), and two counts of aggravated sexual assault of a child under 14 years of age

1 Unless otherwise indicted, all further statutory references are to the Penal Code.

(§ 269, subd. (a)(5)).[2] The victims were Saavedra's preteen stepgranddaughters, D. and M. The trial court sentenced Saavedra to prison for a total of 85 years to life.[3]

Saavedra contends that (1) insufficient evidence supports his conviction on counts 2, 6, 7, 9, 10 and 12; and (2) the trial court committed instructional error. We conclude that Saavedra's contentions are without merit, and accordingly we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Saavedra's Molestation of M.*

Saavedra is married to M.'s maternal grandmother. Saavedra molested M. several times when she was nine, 10 or 11 years old, and those incidents formed the basis of nine of the counts on which Saavedra was convicted.

1. *The Charlie's Angels Incident*

M. described an incident that occurred when she was 10 years old and was watching the movie *Charlie's Angels* on the bed at Saavedra's house. Saavedra lay down in back of M. and wrapped his arm around her waist. He then slipped his hand beneath M.'s underwear and digitally penetrated her vagina. M. was scared and tried to push

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2 The jury also made true findings that Saavedra used force, violence, duress, menace or the threat of bodily harm in committing the charged crimes (§ 1203.066, subd. (a)(1)), and that the crimes involved multiple victims (§§ 667.61, subd. (e)(5), 1203.066, subd. (a)(7)).

3 More specifically, the trial court imposed a determinate sentence of 40 years plus three consecutive indeterminate sentences of 15 years to life.

Saavedra away, but he did not stop. He finally stopped after M. sat up and moved away to the other side of the bed. Saavedra then grabbed M.'s breasts with his hands.

Saavedra was charged with and convicted of two counts based on the *Charlie's Angels* incident: (1) committing a lewd act on a child under 14 years of age by force or duress (§ 288, subd. (b)(1) (count 6)), and (2) aggravated sexual assault of a child under 14 years of age (§ 269, subd. (a)(5) (count 9)).

2. *Incident After M. Exited the Shower*

The second incident occurred in M.'s home, when she was 10 or 11 years old, after she had taken a shower and was clothed in underwear and a towel. Saavedra followed M. into her room and closed the door. He kissed M. on the neck and then digitally penetrated her vagina after placing his hand beneath her underwear. One of Saavedra's arms was wrapped around M.'s waist to hold her. She tried to push Saavedra away and told him to get out of her room, but he did not leave until he heard M.'s brothers come running upstairs.

Saavedra was charged with and convicted of two counts based on the after-the-shower incident: (1) committing a lewd act on a child under 14 years of age by force or duress (§ 288, subd. (b)(1) (count 10)), and (2) aggravated sexual assault of a child under 14 years of age (§ 269, subd. (a)(5) (count 12)).

3. *Hallway Incident at Aunt's House*

The third incident in which Saavedra molested M. occurred in the hallway at her aunt's house when M. was 11 years old. Saavedra stood in front of M. in the hallway and put his hand under her skirt and touched her genital area over her underwear. As

Saavedra moved to put his hand inside of M.'s underwear, he stopped because someone ran into the house.

Saavedra was charged with and convicted of one count based on the hallway-at-aunt's-house incident: committing a lewd act on a child under 14 years of age (§ 288, subd. (a) (count 13)).

4. *Incident as M. Was Entering Her Aunt's Bedroom*

The fourth instance of Saavedra's molestation of M. occurred on Christmas when she was 11 years old. As M. was walking into her aunt's bedroom, Saavedra grabbed M. by the waist and touched her genital area through the fabric of her skirt.

Saavedra was charged with and convicted of one count based on the entering-aunt's-bedroom incident: committing a lewd act on a child under 14 years of age (§ 288, subd. (a) (count 14)).

5. *The Kiss Incident Involving M.*

Saavedra's fifth act of molestation toward M. occurred in the kitchen at M.'s aunt's house. Saavedra turned M. around, grabbed her neck and kissed her with an open mouth while trying to insert his tongue into her mouth. She pushed him away and told him to stop.[4]

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4 M. also testified that Saavedra kissed her on two other occasions using his tongue, and on at least one occasion he succeeded in putting his tongue into her mouth.

Saavedra was charged with and convicted of one count based on the kiss incident involving M.: committing a lewd act on a child under 14 years of age (§ 288, subd. (a) (count 8)).

6. *Incident of M.'s Hand on Saavedra's Penis*

The sixth incident of molestation described by M. occurred when she was 11 years old and was standing face-to-face with Saavedra. Saavedra moved closer to M. and grabbed her hand by the wrist. He placed M.'s hand inside of his pants and onto his bare penis and moved her hand up and down. Saavedra "wasn't putting that much pressure" on M.'s wrist, so M. managed to pull her hand away and escape to another room.

Saavedra was charged with and convicted of one count based on the hand-on-the-penis incident involving M.: committing a lewd act on a child under 14 years of age by force or duress (§ 288, subd. (b)(1) (count 7)).

7. *Incident of Touching M.'s Genital Area over Her Underwear*

The seventh incident of molestation to M. occurred when Saavedra touched M.'s genital area over her underwear.

Saavedra was charged with and convicted of one count based on touching M's genital area over her underwear: committing a lewd act on a child under 14 years of age (§ 288, subd. (a) (count 11)).

B. *Saavedra's Molestation of D.*

D. is M.'s older sister. According to the evidence at trial, Saavedra molested D. when she was 11 or 12 years old. Those incidents of molestation formed the basis for three of the counts on which Saavedra was convicted.[5]

1. *Incident of D.'s Hand on Saavedra's Penis*

D. described an incident during which Saavedra caused her to touch his penis when she was 12 years old. According to D.'s trial testimony, Saavedra grabbed her hand and placed it on his penis. Saavedra released her hand in a second or two after she was "trying to let go" and told Saavedra to stop. However, according to D.'s description to a child interview specialist closer in time to the molestation, when Saavedra placed D.'s hand on his penis, he directed her how to touch him, saying, "'No, go like that'" and then, according to D., "he would push it like . . . for me to push his private thing."

Saavedra was charged with and convicted of one count based on the hand-on-the-penis incident involving D.: committing a lewd act on a child under 14 years of age by force or duress (§ 288, subd. (b)(1) (count 2)).

2. *The Kiss Incident Involving D.*

A second incident of molestation involving D. occurred when Saavedra kissed D. on the mouth.

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[5] The jury was unable to reach a verdict on two other counts involving D., and those counts were later dismissed.

Saavedra was charged with and convicted of one count based on the kiss incident involving D.: committing a lewd act on a child under 14 years of age (§ 288, subd. (a) (count 3)).

3. *Incident of Touching D.'s Breasts*

Saavedra's third molestation of D. occurred when she was around 12 years old. Saavedra touched D.'s breasts with his hands over her clothes.

Saavedra was charged with and convicted of one count based on his touching of D.'s breasts: committing a lewd act on a child under 14 years of age (§ 288, subd. (a) (count 4)).

C. *Disclosure of the Molestation and the Subsequent Police Investigation*

Both D. and M. testified that they were reluctant to disclose the molestation. Saavedra repeatedly told both girls during the time that he was molesting them that if they disclosed the molestation, it would cause big problems for him; disrupt family relationships; and that if he went to jail, his own young children would be left without a father. Further, the girls' mother was sick with high blood pressure during the period of the molestation, and M. and D. feared that they would worsen their mother's health if they told her what Saavedra was doing to them. M. testified that Saavedra told her that her mother might get sick if M. disclosed the molestation.

M. and D. eventually told their mother about the molestation when M. was 12 years old and D. was 13 years old. Their mother contacted the police, and the police set up recorded pretext telephone calls between M. and D. and Saavedra. During D.'s call with Saavedra, she told him that she and M. were at the school counselor's office and

were going to disclose that he was touching them and kissing them. Saavedra told her not to disclose the molestation because he would have a "big problem," could be put in jail and would lose everything. During M.'s call with Saavedra she told him that she had not disclosed the molestation. Saavedra expressed his relief, stated that he could be put in jail, and promised that he "won't do anything again."

In an interview with a police investigator, Saavedra initially denied ever inappropriately touching M. or D., but after recordings of the pretext telephone calls were played for him, Saavedra admitted that he once inappropriately touched M.'s vagina under her shorts in a sexual manner, and that he once kissed D. on the mouth.

D. *Conviction and Sentence*

As detailed above, Saavedra was convicted of six counts of committing a lewd act on a child under the 14 years of age (§ 288, subd. (a)), four counts of committing a lewd act on a child under 14 years of age by force or duress (§ 288, subd. (b)(1)), and two counts of aggravated sexual assault of a child under 14 years of age (§ 269, subd. (a)(5)). Saavedra was sentenced to prison for a total of 85 years to life.

II

DISCUSSION

A. *Sufficient Evidence of Force Supports the Convictions on Counts 2, 6, 7, 9, 10 and 12*

Saavedra's first argument is that the record contains insufficient evidence of force or duress to support the conviction on the four counts of committing a lewd act on a child under 14 years of age by force or duress (§ 288, subd. (b)(1) (counts 2, 6, 7 & 10)) and

the two counts of aggravated sexual assault of a child under 14 years of age (§ 269, subd. (a)(5)) (counts 9 & 12)).

A conviction under section 288, subdivision (b)(1) requires a finding that the defendant committed the lewd act "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." (*Ibid*.) Similarly, a conviction for aggravated sexual assault on a child in violation of section 269 subdivision (a)(5) requires that the act of penetration be "accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." (§ 289, subd. (a)(1); see also § 269, subd. (a)(5) [requiring an act in violation of § 289, subd. (a)(1)].) The case was tried on the theory that Saavedra used either force or duress in committing the acts of molestation charged in counts 2, 6, 7 and 10 as violations of section 288, subdivision (b)(1), and charged in counts 9 and 12 as violations of section 269, subdivision (a)(5). According to Saavedra, insufficient evidence in the record supports a finding on the element of force or duress for a conviction under either statute.

"'In reviewing a challenge to the sufficiency of the evidence . . . , we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citation.] 'The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Ramirez* (2006) 39 Cal.4th 398, 464.) Reversal is not warranted "unless it

appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "[I]t is not within our province to reweigh the evidence or redetermine issues of credibility." (*People v. Martinez* (2003) 113 Cal.App.4th 400, 412.) Significantly too, "'[i]f the circumstances reasonably justify the verdict of the [trier of fact], the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will *not* warrant interference with the determination of the [trier of fact].'" (*People v. Love* (1960) 53 Cal.2d 843, 850-851, italics added.)

We first analyze whether sufficient evidence supports a finding that Saavedra used force in committing the molestation charged in counts 2, 6, 7, 9, 10 and 12.

The force required for a conviction under section 288, subdivision (b)(1) — as charged in counts 2, 6, 7 and 10 — is "'physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.'" (*People v. Neel* (1993) 19 Cal.App.4th 1784, 1790 (*Neel*).) Force is sufficient for a conviction under section 288, subdivision (b) if it is "different from and in excess of the type of force which is used in accomplishing similar lewd acts with a victim's consent." (*Neel*, at p. 1790.) Thus, the force required under section 288, subdivision (b) "includes acts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves." (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005 (*Alvarez*).) The force required to establish a violation of section 269, subdivision (a)(5) — as charged in counts 9 and 12 — is "force which is sufficient to overcome the victim's will." (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1200 (*Asencio*); cf. *People v. Griffin* (2004) 33

Cal.4th 1015, 1027 ["in a forcible rape prosecution the jury determines whether the use of force served to overcome the will of the victim to thwart or resist the attack, *not* whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her attacker"].)

We turn to each of the acts of molestation alleged in counts 2, 6, 7, 9, 10 and 12 to determine whether the record contains sufficient evidence of force.

1. *Counts 2 and 7 (Hand-on-penis Incidents with D. and M.)*

Counts 2 and 7 charged violations of section 288, subdivision (b)(1) based on the incidents in which Saavedra caused D. and M. to place their hands on his penis.

As D. described the incident involving her: (1) Saavedra grabbed her hand and placed it on his penis; (2) she was "trying to let go"; and (3) Saavedra "push[ed]" her hand against his penis in a particular way.

As M. testified concerning the incident involving her: (1) Saavedra grabbed her hand by the wrist; (2) he moved M.'s hand up and down on his bare penis; and (3) M. managed to pull her hand away from Saavedra's grasp and left the room.

The facts involving both M. and D. fall squarely within the fact pattern that numerous cases have found to constitute the force required for a conviction under section 288, subdivision (b), namely, a defendant grabbing the hand of a victim against her will and moving the hand around on his penis. (*Neel*, *supra*, 19 Cal.App.4th at p. 1790) [the act of "grabbing [the victim's] wrist, placing her hand on his penis, and then 'making it go up and down' constitute force within the meaning of [section 288,] subdivision (b)"]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 48 (*Pitmon*) ["defendant's

manipulation of [the victim's] hand as a tool to rub his genitals was a use of physical force beyond that necessary to accomplish the lewd act"]; *People v. Babcock* (1993) 14 Cal.App.4th 383, 386 [sufficient evidence of force within the meaning of § 288, subd. (b) was established because "the evidence demonstrate[d] defendant grabbed [the victims'] hands and forced them to touch his genitals"].)

As Saavedra grabbed D.'s and M.'s hand against their will and manipulated his penis with it, we conclude that in committing the molestation charged in counts 2 and 7 Saavedra used "'physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.'" (*Neel*, *supra*, 19 Cal.App.4th at p. 1790.)

2. *Counts 6 and 9 (Charlie's Angels Incident with M.) and Counts 10 and 12 (After-the-shower Incident with M.)*

The remaining four counts that Saavedra contends are supported by insufficient evidence involve Saavedra's digital penetration of M. on two occasions while he held her around the waist and she tried to push him away. Based on these incidents, Saavedra was convicted of two counts of violating section 288, subdivision (b)(1) (counts 6 & 10) and two counts of violating section 269, subdivision (a)(5) (counts 9 & 12).

The first incident occurred while M. was on Saavedra's bed watching *Charlie's Angels*. Specifically, (1) Saavedra wrapped his arms around M.'s waist; and (2) although M. tried to push Saavedra away, he continued to digitally penetrate her. The second incident occurred after M. exited the shower. Specifically, (1) Saavedra wrapped his arm

around M.'s waist to hold her; and (2) M. tried to push Saavedra away while he continued to molest her.

Because Saavedra molested M. on both occasions while holding her around the waist and continuing to penetrate her after she tried to push him away, he used "'physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself'" (*Neel*, *supra*, 19 Cal.App.4th at p. 1790), as required by section 288, subdivision (a), and "force which is sufficient to overcome the victim's will" (*Asencio*, *supra*, 166 Cal.App.4th at p. 1200), as required by section 269, subdivision (a)(5). Case law is in accord that force sufficient to support a conviction under either statute is present when a defendant holds a victim in place to accomplish penetration. (See, e.g., *Alvarez*, *supra*, 178 Cal.App.4th at p. 1005 [sufficient force was shown for the purposes of §§ 288, subd. (b), 269, subd. (a)(5) when defendant, "holding [victim] 'tight' and 'hard,' . . . digitally penetrated her against her will"; and on another incident when the defendant "forcibly pulled [the victim] onto his lap and prevented her from leaving while he kissed her and inserted his finger in her vagina"]; *People v. Bolander* (1994) 23 Cal.App.4th 155, 161 (*Bolander*) ["defendant's acts of overcoming the victim's resistance to having his pants pulled down, bending the victim over, and pulling the victim's waist towards him constitute force within the meaning of" § 288, subd. (b)]; *Asencio*, at pp. 1205-1206 [evidence of force sufficient under § 269, subd. (a)(5) when the defendant held the victim in place by rolling over onto her and then digitally penetrated her].)

As we have concluded that sufficient evidence supports a finding of force required for the convictions on counts 2, 6, 7, 9, 10 and 12, we reject Saavedra's argument that the record contains insufficient evidence of force or duress as to those counts.[6]

B. *Saavedra's Assertions of Instructional Error Are Without Merit*

We next consider Saavedra's assertions of instructional error. "[A]ssertions of instructional error are reviewed de novo." (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838.)

1. *The Modified Instructions on Duress Were Not Improperly Argumentative*

As requested by the prosecution, CALCRIM Nos. 1045 and 1111 were modified to include additional language concerning duress.[7] The trial court's modification to CALCRIM Nos. 1045 and 1111 is indicated in italics:

> ". . . When deciding whether the act was accomplished by duress, consider all the circumstances, including . . . *whether the acts occurred in an isolated location, the disparity in physical size, whether there was frequent interaction between the defendant and [D.] and/or [M.], whether the abuse was continuous or involved a single incident, whether statements were*

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6 Because the convictions under section 288, subdivision (b)(1) and section 269, subdivision (a)(5) require either a finding of force *or* a finding of duress, we need not, and do not, consider whether sufficient evidence supports a finding of duress as to counts 2, 6, 7, 9, 10 and 12. (See *Bolander*, *supra*, 23 Cal.App.4th at p. 161 ["In light of our conclusion that defendant's acts constitute force within the meaning of section 288, subdivision (b), we need not address defendant's contention that the evidence is insufficient to prove that defendant used duress to accomplish the [molestation]."].)

7 CALCRIM No. 1045 applies to the counts charged under section 269, subdivision (a)(5), and CALCRIM No. 1111 applies to the counts charged under section 288, subdivision (b)(1). The trial court also included the same language concerning duress in the instruction for the enhancement under section 1203.066, subdivision (a)(1).

made indicating negative occurrences would result from disclosure, the presence or absence of psychological dominance."

There is no dispute that the language added by the trial court accurately reflects controlling case law. (See, e.g., *People v. Cochran* (2002) 103 Cal.App.4th 8, 13-14; *People v. Senior* (1992) 3 Cal.App.4th 765, 775; *Pitmon*, *supra*, 170 Cal.App.3d at p. 51.) However, Saavedra contends that the modified instructions were impermissibly argumentative, and thus violated his federal constitutional rights to a trial by jury and due process.

A trial court may modify a jury instruction to "'focus the jury's attention on facts relevant to its determination . . . by listing, in a neutral manner, the relevant factors supported by the evidence.'" (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1253 (*Carter*).) "However, the instruction should not take a position as to the *impact of the factors*, nor should it *imply that any particular conclusions be drawn* from specific items of evidence." (*Ibid*., italics added.) In such a case, the instruction becomes impermissibly argumentative. (*Ibid*.) As our Supreme Court has explained, an instruction is argumentative if "it would invite the jury to draw inferences favorable to the [party] from specified items of evidence on a disputed question of fact." (*People v. Wright* (1988) 45 Cal.3d 1126, 1135 (*Wright*); see also *People v. Roberts* (1992) 2 Cal.4th 271, 314 ["instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative"].) A party "does not have a right to an instruction that would improperly imply the conclusion to be drawn from [particular] evidence." (*People v. Harris* (1989) 47 Cal.3d 1047, 1098, fn. 31.)

Focusing on the specific content of the modified instructions, we reject Saavedra's contention that the instructions are "too fact-specific and result-oriented to pass muster." Although the modified instructions list several additional factors that may be considered in determining whether duress was present during a molestation, the instructions do not "take a position as to the impact of the factors" and do not "imply that any particular conclusions be drawn from specific items of evidence." (*Carter*, *supra*, 19 Cal.App.4th at p. 1253.) On the contrary, the instructions do no more than direct the jury's attention *to the factors themselves*. Significantly too, the instructions do not focus on *specific evidence* pertaining to any of the identified factors. (*Wright*, *supra*, 45 Cal.3d at p. 1135; see also *People v. Randle* (1992) 8 Cal.App.4th 1023, 1036-1037 [modified instruction was not impermissibly argumentative in that it did not focus on any specific items of evidence, but rather referred generically to a relevant factor].) Therefore, the trial court did not err in giving the modified instructions.

C. *The Trial Court Did Not Err in Instructing the Jury with CALCRIM No. 1191*

Saavedra contends that the trial court erred in instructing the jury with CALCRIM No. 1191 — evidence of uncharged sex crimes.[8]

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8 The trial court instructed with CALCRIM No. 1191 as follows:

"The People presented evidence that the defendant committed the crime of lewd and lascivious act upon a minor that was not charged in this case. This crime is defined for you in these instructions.

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

According to Saavedra, this instruction was given based on the testimony of another of Saavedra's granddaughters, 15-year-old V., who testified during the prosecution's rebuttal case. V. testified that when she was 13 years old, Saavedra lay down beside her on a bed in his house while she was watching television and then rubbed her thigh.

Although Saavedra's argument could be clearer, it appears to have two parts. First, Saavedra contends that the trial court erred in admitting V.'s testimony as part of the prosecution's rebuttal case. Second, Saavedra contends that this error was exacerbated by instructing with CALCRIM No. 1191 that the uncharged act described in V.'s testimony could prove that Saavedra was disposed or inclined to commit sexual offenses. Combining these points, Saavedra argues that "[t]he trial court erred in allowing the prosecutor to take unfair advantage by withholding a critical witness whose last-minute testimony came in rebuttal, and then aggravating the prejudice by instructing the jury to use the evidence as propensity evidence."

"If the People have not met this burden of proof, you must disregard this evidence entirely.

"If you decide that the defendant committed the uncharged offense, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit the crimes charged. If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charged crimes. The People must still prove each charge and allegation beyond a reasonable doubt.

"Do not consider this evidence for any other purpose."

The first problem with Saavedra's argument is that defense counsel did not object to the admission of V.'s testimony as part of the prosecution's rebuttal case.[9] Because Saavedra did not object at trial to the admission of the evidence, he may not raise the issue on appeal. (See Evid. Code, § 353 ["A verdict or finding shall not be set aside . . . by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion. . . ."]; *People v. Seijas* (2005) 36 Cal.4th 291, 302 ["In accordance with [Evid. Code, § 353], we have consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable."].)

Second, because Saavedra has failed on appeal in challenging the admission of V.'s testimony, he must also necessarily fail in establishing that the trial court improperly instructed with CALCRIM No. 1191 based on that testimony.

Third, even were we to find that V.'s testimony cannot properly form the basis for instructing the jury with CALCRIM No. 1191, the record contains ample other evidence of *uncharged* lewd and lascivious acts that Saavedra committed against M. For instance

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9 The issue of V.'s testimony was raised by defense counsel only after the fact, during the discussion of jury instructions. Defense counsel argued that CALCRIM No. 1191 was warranted only if V.'s testimony was admitted under Evidence Code section 1108, subdivision (a). Taking the position that V.'s testimony was not admitted under that provision of the Evidence Code, defense counsel argued that the trial court should not instruct with CALCRIM No. 1191. The trial court rejected defense counsel's argument and instructed the jury with CALCRIM No. 1191. That decision was proper. Regardless of the basis for the admission of V.'s testimony, once admitted, the testimony unquestionably confronted the jury with evidence of an uncharged lewd and lascivious act. Under those circumstances CALCRIM No. 1191 was fully applicable.

(1) M. testified that Saavedra kissed her on three occasions, but he was charged with only one count based on kissing M.; and (2) M. testified to another incident at Christmas during which Saavedra "touch[ed] [her] butt" while she was washing the dishes. These uncharged acts provide a sound basis for instructing the jury with CALCRIM No. 1191 regardless of the admissibility of V.'s testimony.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

MCDONALD, J.